



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/697,800	10/31/2003	Jorg Bernard	G5005.0027	1152
32173	7590	05/07/2008		
DICKSTEIN SHAPIRO LLP 1177 AVENUE OF THE AMERICAS (6TH AVENUE) NEW YORK, NY 10036-2714			EXAMINER MAHAFFEY, KELLY J	
			ART UNIT 1794	PAPER NUMBER
			MAIL DATE 05/07/2008	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/697,800

**Applicant(s)**

BERNARD ET AL.

**Examiner**

Kelly Mahafkey

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 10 March 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 30-50 and 61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 30-50 and 61 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

Amendments made 3/10/08 have been entered.  
Claims 30-50 and 61 are pending.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on March 10, 2008 has been entered.

***Specification***

The objection to the specification, specifically the abstract, has been withdrawn due to applicant's amendments submitted 3/10/08.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 50 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 50 is indefinite for the use of improper Markush-type language in the recitation of the various elements (i.e. "selected from ... and..."). The claims should recite a group of elements using accepted U.S. Patent language:

(a) [open set]: "the ingredient **comprises** A, B, C, **or** D."

(b) [closed set]: "the ingredient is selected from the group **consisting of** A, B, C **and** D."

***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 102(e) rejection of claims 30-32, 34, 38-42, 44-47 and 49 as being anticipated by Barrett et al (US 6531174) has been withdrawn in light of applicant's amendments submitted 3/10/08.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 103(a) rejection of claims 30-31, 34-39, 42-46 and 48-50 over Willibald-Ettle et al (US 6458400) has been withdrawn in light of applicant's amendments submitted 3/10/08.

The 103(a) rejection of claims 33, 36-37, 43, 48, 50, and 61 over Barrett et al (US 6531174) in view of the combination of Cherukuri et al (US 2003/0026826) and Willibald-Ettle et al (US 6458400) has been withdrawn in light of applicant's amendments submitted 3/10/08.

Claims 30-35, 38-42, 44-47, and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barrett et al. (US 6531174 B2) in view of Takazoe et al. (US 4556429) or Koji et al. (JP 40119164A )

Barrett et al. (Barrett) teach of a gelatin-free soft caramel comprising a soft caramel base mass that contains a polysaccharide hydrocolloid, a crystalline sweetener phase, and a non-crystalline sweetener phase (Abstract and Column 4 lines 45-54). Note: Applicant defines "soft caramel" as "a sweet that is made from syrup, fat, and a sweetener solution by boiling". See specification, page 3 paragraph 4. Since, Barrett teaches that the composition is a sweet composition made from syrup, fat, and a sweetener solution by boiling (Abstract and Example 2), Barrett teaches of a soft caramel as instantly claimed. Barrett teaches that the polysaccharide hydrocolloid is selected from the group including gum arabic, gellan gum, and combinations thereof

(Column 2 lines 23-29). Barrett teaches that the non-crystalline sweetener phase is formed of maltitol syrup and/or glucose syrup (Column 4 lines 39-54 and Column 5 lines 30-35). Barrett teaches that the caramel can include sucrose that the sucrose can be replaced with sugar substitutes (Column 4 lines 39-54). Barrett teaches that the composition contains about 0.5-20%, preferably about 2-12% fat (Column 5 lines 12-15). Barrett teaches that the caramel contains emulsifiers, artificial sweeteners, flavor enhancers, and coloring agents, such as natural and synthetic food dyes (Column 5 lines 16-24 and 34-39). Barrett teaches that the caramel contains about 0.1-5% milk proteins (Column 5 lines 16-24). Barrett teaches that the caramel composition contains essential oils (Column 2 lines 58-68). Barrett teaches that the caramel composition contains about 2-10% water (Column 2 lines 10-12). Barrett teaches that the caramel composition contains medicinal active agents, such as vitamins, minerals, and herbal extracts (Column 3 lines 60-67). Regarding the ratio of gum arabic and gellan gum in the composition, Barrett teaches that the polysaccharide hydrocolloid is selected from the group including gum arabic, gellan gum, and combinations thereof (Column 2 lines 23-29). Barrett teaches that the caramel composition contains about 0-10% gum arabic (Column 4 lines 33-35). Barrett teaches that the caramel composition contains about 0.5-5% gellan gum (Column 2 lines 19-27). Thus, Barrett teaches that the ratio of gum arabic to gellan gum encompasses a ratio of 5-15:1 as recited in claim 33.

Barrett is silent to the crystalline sweetener phase as isomaltulose as recited in claim 30.

Takazoe et al. (Takazoe) teach of an improved sweetener composition. Takazoe teaches that the sweetener composition is low-cariogenic since it is low in cariogenic itself and also inhibits the formation of insoluble glucan from sucrose in the oral cavity. Takazoe teaches that the sweetener comprises sucrose and palatinose, i.e. isomaltulose. Takazoe teaches that the sweetener may be crystalline and is used in foods to replace sucrose. Refer specifically to Abstract, Column 1 lines 11-22 and 49-57, and Column 2 lines 15-25. Takazoe teaches that the sweetener is incorporated into caramels (Column 5 lines 3-12).

Koji et al. (Koji) teaches of a caramel composition which has improved taste, with little induction of dental caries, outstanding shapability and shape retnetivity without the need for addition of sucrose, formed by incorporating palatinose, i.e. isomaltulose (Abstract).

Regarding the crystalline sweetener phase as isomaltulose, it would have been obvious to one of ordinary skill in the art at the time the invention was made to substitute palatinose or a combination of palatinose and sucrose for a portion of the sugar in the caramel composition as taught by Barrett in view of Takazoe or Barrett in view of Koji. One would have been motivated to do so for the benefits of palatinose or isomaltulose, such an improved dental candy as taught by Takazoe and Koji, and to obtain improved taste and shape of the caramel composition as taught by Koji.

Claims 36, 37, 43, 48, 50, and 61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barrett et al. (US 6531174 B2) in view of Takazoe et al. (US 4556429) or Koji et al. (JP 40119164A Abstract only), further in view of Willibald-Ettle et al. (US 6458400 B1).

Barrett teach of a caramel composition as discussed above. Barrett, however, is silent to the caramel as containing a high intensity sweetener, such as saccharin, as recited in claims 36, 37, and 48, a specific food dye, such as riboflavin, as recited in claim 43, and an active substance, such as mentholeucalyptus as recited in claims 50 and 61.

Willibald-Ettle (Willibald) teach of soft confections and the use of sweeteners in those confections (abstract). Willibald teach that high intensity sweeteners that intensive sweeteners, including saccharin are add to confections to increase the sweetening power (Column 3 lines 25-34). Willibald teaches a suitable colorant for confectionary materials is riboflavin (Column 3 lines 34-44). Willibald teaches that suitable additives for confections include clinically active substances, such as mentholeucalyptus (Column 3 lines 5-17).

Regarding the caramel as containing a high intensity sweetener, such as saccharin, it would have been obvious to one of ordinary skill in the art at the time the

Art Unit: 1794

invention was made to select a combination of sweeteners depending on the desired sweetness of the final product. One would have been motivated to add saccharin, i.e. a high intensity sweetener, in order to increase the sweetness of the final product with minimal amounts of the ingredient. Such was commonly done as shown by Willibald and would have been within the ordinary skill and ingenuity of one of ordinary skill in the art.

Regarding the caramel as containing a specific food dye, such as riboflavin, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a colorant, such as riboflavin, in the confectionary product depending on the desired color of the final confectionary product. Such was commonly done as shown by Willibald and would have been within the ordinary skill and ingenuity of one of ordinary skill in the art.

Regarding the caramel as containing an active substance, such as mentholeucalyptus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a known medicament for confectionary materials depending on the desired effect of the confection during consumption, i.e. one of ordinary skill in the art at the time the invention was made would have been motivated to include mentholeucalyptus in the caramel confection in order to obtain a final product that had a soothing throat effect when consumed. Such was commonly done as shown by Willibald and would have been within the ordinary skill and ingenuity of one of ordinary skill in the art.

### ***Response to Arguments***

Applicant's arguments with respect to an absence of isomaltulose in the caramel confection have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

Art Unit: 1794

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/  
Primary Examiner  
Art Unit 1794

/Kelly Mahafkey/  
Examiner  
Art Unit 1794